

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

RODRICK TERRELL PORTER,

Defendant-Appellant.

UNPUBLISHED

October 18, 2011

No. 298562

Bay Circuit Court

LC No. 09-011061-FC

Before: SHAPIRO, P.J., and SAAD and BECKERING, JJ.

PER CURIAM.

Defendant Rodrick Terrell Porter appeals as of right from his jury trial convictions of interfering with electronic communications causing injury or death, MCL 750.540(5)(b), larceny in a building, MCL 750.360, and domestic violence, MCL 750.81(2). Defendant was sentenced as a second habitual offender, MCL 769.10, to concurrent terms of 18 to 72 months in prison for the interfering with electronic communications and larceny convictions, and to 93 days in jail for the domestic violence conviction, with credit for 176 days served. We affirm defendant's convictions and sentences, but remand for the ministerial task of correcting the presentence investigation report (PSIR).

Defendant and the victim dated for a few months in 2009 and broke up in September. At about 12:30 a.m. on November 22, 2009, defendant came to the victim's apartment while intoxicated. After the victim let defendant in, they began arguing. Defendant broke the victim's cellular telephone, took her keys, and then attacked her, causing bruises and injury around her head and neck. Although the victim also alleged that defendant forced her to engage in sexual activity, defendant was acquitted of two charges of first-degree criminal sexual conduct, MCL 750.520b.

On appeal, defendant first claims that the prosecutor misstated the law regarding the burden of proof during her closing argument. Because defendant did not challenge the propriety of the prosecutor's remarks during the trial, he has not preserved this issue for our review. See *People v Stanaway*, 446 Mich 643, 687; 521 NW2d 557 (1994). We review unpreserved claims of error for plain error affecting substantial rights. *People v Carines*, 460 Mich 750, 763-764, 774; 597 NW2d 130 (1999).

Defendant contends that the prosecutor erroneously described the “reasonable doubt” standard in closing argument by stating that finding guilt beyond a reasonable doubt meant “using your reason and common sense.” Defendant argues that this statement equates the reasonable doubt standard with a “common sense” inquiry, and that the prosecutor essentially told the jury to determine defendant’s guilt through a “gut determination” rather than a sincere examination of the evidence. We disagree.

The prosecutor’s statement does not imply that the jurors must rely solely on their “guts” or their common sense when determining defendant’s guilt, instead of considering the evidence presented at trial. The prosecutor’s statement is consistent with the trial court’s instruction defining reasonable doubt, which defendant agrees was a correct statement of the applicable law. It appears that the prosecutor mentioned “using your reason and common sense” not to insinuate to the jurors that they should ignore the evidence, but to remind the jurors of how they should consider the evidence when determining if the reasonable doubt standard was met. Immediately after making the contested statement, the prosecutor set forth questions for the jurors to consider when determining whether the evidence presented at trial established that defendant interfered with an electronic communication and caused injury. The prosecutor did not diminish the presumption of innocence or the burden of proof when making the contested statement and her statement did not constitute prosecutorial misconduct.

Moreover, the trial court’s instructions to the jury cured any error. An erroneous legal argument made by the prosecutor can potentially be cured if the jury is correctly instructed on the law. *People v Grayer*, 252 Mich App 349, 357; 651 NW2d 818 (2002). Defendant does not dispute that the trial court properly instructed the jury regarding the “reasonable doubt” burden of proof placed on the prosecutor. Further, the trial court properly instructed the jury that the prosecution’s closing argument was not evidence, and that if a lawyer said something different from the trial court regarding the law, the jurors should follow what the trial court said. See MCR 6.414(G).

Next, defendant argues that the trial court improperly scored offense variable (OV) 9 at ten points. However, we need not decide the issue because even if defendant is correct, resentencing would not be required. Defendant’s prior record variable (PRV) score was 17, corresponding to PRV level C, and his total OV score was 30, corresponding to OV level II. These PRV and OV scores resulted in a minimum guidelines range of zero to 21 months for defendant, a second habitual offender. If OV 9 were scored at zero, defendant’s total OV score would be 20, which also corresponds to OV level II and a minimum guidelines range of zero to 21 months. See MCL 777.21; MCL 777.67. “Where a scoring error does not alter the appropriate guidelines range, resentencing is not required.” *People v Fransisco*, 474 Mich 82, 89 n 8; 711 NW2d 44 (2006).

Finally, defendant notes that during the sentencing hearing, he requested that the court remove references in his PSIR to a 1993 juvenile conviction for unarmed robbery. The trial court granted the request, but the statement was not removed from the PSIR. Accordingly, defendant is entitled to the removal of the reference. *People v Britt*, 202 Mich App 714, 718; 509 NW2d 914 (1993).

We affirm defendant's convictions and sentences, and remand for the limited purpose of modifying defendant's PSIR consistent with this opinion. We do not retain jurisdiction.

/s/ Douglas B. Shapiro

/s/ Henry William Saad

/s/ Jane M. Beckering